KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-272-94

GOPAL SRI RAM, SITI NORMA YAAKOB JJCA, AHMAD FAIRUZ J

18 JANUARY 1996

***Contract** — Agency — Appointment of agent or sub-agent — Whether had to be in writing or be evidenced in writing — Whether appointment could be gathered from facts of case and conduct of parties — Contracts Act 1950 Part X*

The respondent, who carried on the business of an insurance agent, alleged that it had appointed the appellant as its sub-agent to sell policies of Mercantile Insurance Sdn Bhd to the public. It was further claimed that the appellant was authorized to receive proposal forms, to issue cover notes, and to receive premiums from vehicle owners. Between February 1990 and September 1991, the respondent sent statements of account to the appellant which reflected the money which had been received by the appellant from the sales that he had made. However, the appellant failed to pay up, even after the respondent had sent a letter before action to it. On 4 January 1993, the appellant's solicitor's wrote to deny any knowledge on the part of their client of the claim.The respondent then caused writ to be issued and moved for summary judgment in the High Court. The appellant delivered a defence in which it denied the sub-agency. The judge found no triable issues, and he accordingly entered judgment in favour of the respondent. In arguing the appeal, counsel of the appellant said, inter alia, that the judge was wrong as: (i) the respondent had not produced any written agreement to support its claim that the appellant had been appointed as its sub-agent, and (ii) the appellant had promptly asserted that it was not liable to the respondent when it received the letter before action.

Held, dismissing the appeal:

(1) The law does not require that an agency or sub-agency agreement must be in writing. Further, Part X of the Contracts Act 1950, which contains the relevant provisions on agency does not contain any requirement that the appointment of an agent or sub-agent has to be in writing or be evidenced in writing. Hence, the appointment may be express or implied, that is to say, it may be gathered from the facts and circumstances of a case and from the conduct of the parties (see p 237E–F); *Kuchwar Lime & Stone Co v Dehri Rohtas Light Railway & Co Ltd* AIR 1969 SC 193 followed.

(2) A party may, by his conduct in all the circumstances of a particular case, be estopped from asserting the absence of an agency

relationship between him and he who claims to be his principal (see p 237G). A

(3) A reasonable man similarly circumstanced as the appellant would, if it were really true that there had been no appointment of sub-agency as later claimed by it, have, post haste sent the statements of account back to the respondent and denied any liability. But the appellant remained silent. The denial by its solicitor's letter of 4 January 1993, came long after the delivery of the account (see p 237H–I). B

(4) It does not lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so (see p 238D–E); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 followed. C

[Bahasa Malaysia summary

Penentang, yang menjalankan perniagaan sebagai ejen insurans, telah menyatakan bahawa ia telah melantik perayu sebagai subejennya untuk menjual polisi Mercantile Insurance Sdn Bhd kepada orang awam. Penentang juga menyatakan bahawa perayu telah diberi kuasa untuk menerima borang cadangan, untuk mengeluarkan nota lindung, dan untuk menerima premium daripada pemunya kenderaan. Antara Februari 1990 dan September 1991, penentang telah menghantarkan pernyataan-pernyataan akaun yang mencerminkan jualan yang perayu telah buat dan wang yang telah diterima olehnya, kepada perayu. Walau bagaimanapun, perayu gagal membayarnya, sungguhpun selepas penentang telah menghantar sepucuk surat sebelum tindakan kepadanya. Pada 4 Januari 1993, peguamcara perayu telah menulis surat untuk menafikan sebarang pengetahuan bagi pihak klien mereka tentang tuntutan itu. Penentang kemudiannya menyebabkan writ dikeluarkan dan memohon untuk penghakiman terus. Perayu mengemukakan pembelaannya di mana ia telah menafikan wujudnya subejensi tersebut. Hakim mendapati bahawa tidak terdapat isu yang boleh dibicarakan, dan oleh yang demikian, beliau pun memasukkan penghakiman yang memihak kepada penentang. Dalam hujahan rayuan, peguambela bagi perayu mengatakan, antara lain, bahawa hakim tersebut telah melakukan kesilapan kerana: (i) penentang tidak mengemukakan sebarang perjanjian bertulis untuk menyokong dakwaannya bahawa perayu telah dilantik sebagai subejen; dan (ii) perayu telah dengan cepat menegaskan bahawa ia tidak bertanggungan terhadap penentang apabila ia menerima surat sebelum tindakan tersebut. D E F G H

Diputuskan, menolak rayuan itu: I

(1) Undang-undang tidak menghendaki bahawa suatu perjanjian ejensi atau subejensi harus dibuat dalam tulisan. Juga, Bahagian X Akta Kontrak 1950, yang mengandungi peruntukan yang relevan mengenai ejensi tidak mengandungi apa-apa syarat bahawa perlantikan ejen atau subejen harus dilakukan dalam tulisan

ataupun dibuktikan oleh tulisan. Maka, perlantikan boleh dilakukan secara nyata atau tersirat. Ini bermakna perlantikan boleh dibuktikan melalui fakta dan keadaan kes, dan kelakuan pihak-pihak yang berkenaan (lihat ms 237E–F); *Kuchwar Lime & Stone Co v Dehri Rohtas Light Railway & Co Ltd* AIR 1969 SC 193 diikut.

(2) Suatu pihak boleh, melalui kelakuannya dalam kesemua keadaan suatu kes yang tertentu, diestop daripada menyatakan bahawa tidak terdapat perhubungan ejensi antaranya dengan seseorang yang mendakwa bahawa dia merupakan prinsipal pihak tersebut (lihat ms 237G).

(3) Seorang yang munasabah yang berada dalam keadaan yang sama dengan perayu akan, jika adalah benar bahawa tidak terdapat perlantikan subejen seperti yang didakwa kemudiannya, dengan segera menghantar pernyataan akaun tersebut kembali kepada penentang dan menafikan sebarang liabiliti. Tetapi perayu berdiam diri sahaja. Penafian melalui surat peguamcaranya yang bertarikh 4 Januari 1993, hanya dibuat selepas masa yang lama setelah penyampaian akaun (lihat ms 237H–I).

(4) Kes ini tidak boleh bergantung terhadap pengataan perayu semata-mata, yang kini menafikan tuntutan penentang. Adalah tidak saksama jika perayu dibiarkan untuk berbuat demikian (lihat ms 238D–E); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 diikut.]

Notes

For cases on agency, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 505–687; 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1130–1140.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331

Kuchwar Lime & Stone Co v Dehri Rohtas Light Railway & Co Ltd AIR 1969 SC 193

Legislation referred to

Contracts Act 1950 Part X
Co-operative Societies Act 1948
Insurance Act 1963

Appeal from: Civil Suit No 22–85–94 (High Court, Pulau Pinang)

Darshan Singh (Darshan Singh & Co) for the appellant.
L Andrew (Andrew & Co) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): We heard and dismissed this appeal on 4 December 1995, without calling upon counsel for the respondent to address us. The reasons for our decision now follow.

The respondent carries on the business of an insurance agent. Its case in the court below rested on the fact that it had appointed the appellant as its sub-agent to sell policies of Mercantile Insurance Sdn Bhd to members of the public generally. The respondent claimed that under the aforesaid appointment, the appellant, as sub-agent, was authorized to receive proposal forms and to issue cover notes to vehicle owners who wished to purchase insurance cover.

It was also part of the respondent's pleaded case that under the terms of the sub-agency, the appellant was to effect sales of cover notes on a 'cash before cover' basis. By that expression is meant that the ultimate consumer will not have his vehicle covered by insurance until and unless he paid for it in advance. The respondent also claimed that the appellant was, under the terms of its appointment as sub-agent, authorized to receive premiums in respect of the cover notes it had sold. From these sums, the appellant was entitled to deduct the commission due to it for making the sales. However, it was under an obligation to pay over the balance to the respondent.

It is not in dispute that between February 1990 and September 1991, the respondent sent statements of account to the appellant. These reflected the sales which the appellant had made and the monies that had been received by the appellant. At the material time, these accounts showed the appellant to be indebted to the respondent in the sum of RM 175,024. 41.

The respondent waited for payment, but none came. It consulted solicitors who wrote to the appellant a letter before action, dated 22 December 1992, demanding payment of the aforesaid sum.

Upon receiving this demand, the appellant too consulted solicitors. They replied on 4 January 1993, denying any knowledge on the part of their client of the claim and requesting copies of several documents, including the agreement of sub-agency and a statement of account.

The respondent then caused writ to be issued and moved for summary judgment. The appellant delivered a defence in which it denied the sub-agency. It then went on to allege, among other matters, that the sub-agency was illegal because it contravened the provisions of the Co-operative Societies Act 1948 and the Insurance Act 1963 as well as the subsidiary legislation made under the latter. These other defences were not taken as alternative pleas. Instead they follow, one upon the other, in seriatim.

The way in which the appellant pleaded its case reveals a singular inconsistency of approach. By no stretch of the imagination could it be said that a sub-agency agreement which, according to the defence, never existed could be illegal. The way in which the defence has been cast left us with the distinct impression that it is an embarrassing pleading and delivered purely to delay the respondent from obtaining judgment in the action.

A The learned judge who heard the respondent's summons for judgment found no triable issues. He accordingly entered judgment in favour of the respondent.

Those are then the relevant facts.

In arguing the appeal, Encik Darshan Singh, of counsel, said that the B judge was wrong in entering summary judgment and that he had overlooked two vital points in his client's favour. He said that if the learned judge had addressed his mind to these two matters, he would have granted the appellant unconditional leave to defend the action. The two points are as follows.

C First, the respondent had not produced any written agreement to support its claim that the appellant had been appointed as its sub-agent. Second, the appellant had, at the first available opportunity, when it received the letter before action, promptly asserted that it was in no way liable to the respondent. We were also referred to the affidavit that was filed on the appellant's behalf in which a challenge to the locus standi of D the respondent was taken. The affidavit also denies that any privity of contract existed between appellant and the respondent.

These arguments are really without any merit and the learned Judge obviously saw through them.

In the first place, the law does not require that an agency or sub-E agency agreement must be in writing. See *Bowstead & Reynolds on Agency* (17th Ed) at p 55 et seq.

Further, Part X of the Contracts Act 1950, which contains the relevant provisions on agency does not contain any requirement that the appointment of an agent or sub-agent has to be in writing or be evidenced F in writing. Hence the appointment may be express or implied, that is to say, it may be gathered from the facts and circumstances of a case and from the conduct of the parties: see, *Kuchwar Lime & Stone Co v Dehri Rohtas Light Railway & Co Ltd* AIR 1969 SC 193.

Another way of stating the proposition is that a party may, by his G conduct in all the circumstances of a particular case, be estopped from asserting the absence of an agency relationship between him and he who claims to be his principal.

Viewed in this way, we perceive that the key to the whole case lies in the conduct of the appellant in this case. Encik Darshan Singh, in response to a question put to him by a member of the panel hearing this appeal, H frankly conceded that his client did indeed receive the statements of account of which we have earlier spoken. It follows that a reasonable man similarly circumstanced as the appellant would, if it were really true that there had been no appointment of sub-agency as later claimed by it, have, post haste sent these accounts back to the respondent and denied any I liability.

But that is not what happened. The appellant remained silent, held onto the accounts, and did nothing about it. The denial by its solicitor's letter of 4 January 1993, came long after the delivery of the account.

When asked why his client had kept silent for a rather long period of time, Encik Darshan Singh's response was that his client was a large company and did not do anything until the letter before action was received. We trust that we will be forgiven if we are unable to detect the logic in this response.

We are of the view that it would be a travesty of justice if we were to accede to the appellant's arguments. We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.

To put it another way, the appellant, by its silence coupled with the other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having done so, it ought not to be permitted to now contend otherwise.

It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and is now beyond question. See *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

Having carefully read the judgment of the learned judge, we were unable to detect any error in reasoning in the way in which he approached the case. This is eminently a fit case for the exercise of the summary power to enter judgment.

The appeal was accordingly dismissed with costs. The order of the learned judge was affirmed. The deposit paid into court by the appellant was directed to be paid out to the respondent to account of its taxed costs.

Appeal dismissed.

Reported by Isabel Liong